U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

September 16, 2016

BY ECF (REDACTED) AND FACSIMILE

The Honorable P. Kevin Castel
United States District Judge
Daniel Patrick Moynihan Federal Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: United States v. Gary Hirst, 15 Cr. 643 (PKC)

Dear Judge Castel:

The Government writes to provide further information regarding the consensually recorded phone conversations between Hirst and Galanis.

As an initial matter, the identification of the number of consensually recorded calls between Hirst and Galanis is a more complicated issue than it might appear on its face. By the Government's unofficial count, there are 921 contacts between Hirst's phones and Galanis's phone that generated a "session" in the FBI's recording system. However, at least 521 of these sessions have no recorded content at all or at a minimum simply reflect a phone ringing without being answered. At best, therefore, only 400 calls between Hirst and Galanis have any spoken content at all. Even among these 400 calls, some number have no conversation of any substance (*e.g.*, "I'm at the bank. I'll call you back."). It is not entirely clear, based on the briefing on this issue to date, exactly which number of recordings Hirst is seeking to elicit, but to the extent he seeks to elicit the number of sessions generated, that number is misleading because more than half of these calls have no audible content.

As set forth in the Government's prior briefing on this matter, Hirst should be precluded from eliciting information about the number of recordings between Hirst and Galanis. The number of recordings of conversations between Hirst and Galanis is of limited probative value and invites the jury to engage in improper speculation about why the Government is choosing not to introduce the remainder of the calls, which might be for any number of reasons wholly apart from the lack of incriminating content in those calls, such as an effort to streamline the trial or avoid cumulative evidence or because of the sheer irrelevance of the content of the conversation to any issue in dispute at this trial. Because of the limited probative value of the number of recordings and because that number invites improper jury speculation about why recordings were not offered, the Court should preclude Hirst from eliciting evidence about the volume of recorded phone calls between Hirst and Galanis.

The Government has previously advised the Court that it intends to elicit from the FBI agent who will authenticate the Hirst/Galanis "Shahini" recording, and who may testify as soon as Monday, the fact that Jason Galanis had consented to the monitoring of his phone. The Government believes that this fact is necessary to explain how the FBI came to be in possession of the phone call, [redacted]

If the Court allows Hirst to elicit evidence about the number of recordings of conversations between Galanis and Hirst, the Government believes that Hirst should be precluded from eliciting evidence about the *contents* of the non-admitted recordings, such as the fact that Ymer Shahini's name did not appear on any of the recordings the Government does not seek to offer at trial. As an initial matter, the Government's authentication witness from the FBI will be exactly that, a custodian who can verify the authenticity of the recording as one obtained from the FBI's systems. He will not have listened to, or otherwise be familiar with, the contents of the recordings and will not be competent to testify about the contents of the recordings. Second, for all the reasons set forth in the Government's prior briefing, the contents of the recordings are not admissible if offered by Hirst. These recordings are hearsay, without an applicable non-hearsay reason for admission or a hearsay exception that allows their admission. The fact that Hirst intends to introduce them to show the absence of certain content does not change the hearsay nature of these statements, because Hirst would seek their introduction to reveal some truth about the content of these recordings. *See, e.g.*, *United States* v. *D'Anjou*, 16 F.3d 604, 610-11 (4th Cir. 1994) (finding no error in District Court's exclusion, as inadmissible hearsay, of ATF interview reports that defendant sought to admit to show the *absence* of statements by witnesses interviewed regarding the defendant's involvement in the charged criminal conduct).

[redacted]

[2] Indeed, given the more than one hundred contacts in 2010 between Hirst's phones and Jason Galanis's home phone number, which was not subject to consensual recording by the FBI, there is ample evidence of unmonitored contacts between Hirst and Jason Galanis [redacted]

Moreover, arguments about the contents of the recordings are also an effort to use specific instances of good conduct (non-incriminating recordings) to argue an inference about Hirst's lack of criminal intent, which is impermissible under the Rules of Evidence. *See* Fed. R. Evid. 405(a); *United States* v. *Benedetto*, 571 F.2d 1246, 1249-50 (2d Cir. 1978) (holding that the defendant "improperly attempted to establish defendant's good character by reference to specific good acts" when, in a trial for receipt of money in connection with the defendant's duties as a meat inspector, the defendant introduced evidence of instances when the defendant had not taken bribes); *United States* v. *Fazio*, No. 11 Cr. 873 (KBF), 2012 WL 1203943, at *5 (Apr. 11, 2012) ("As many courts have made clear, a defendant may not affirmatively try to prove his innocence by reference to specific instances of good conduct . . . ."). Because Hirst could not offer the recordings themselves to establish the nature of the contents of the recordings, he should be precluded from eliciting testimony about the content of the recordings.

In sum, the Government is seeking three rulings from the Court. First, the Government seeks to preclude Hirst from eliciting any information about the number of recordings made of calls between Galanis and Hirst. [redacted] Third, to the extent the Court allows Hirst to elicit information about the number of recordings made of conversations between Galanis and Hirst, Hirst should be precluded from eliciting evidence about the contents of the recordings the Government is choosing not to offer in its case-in-chief.

Respectfully submitted,

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